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FILED.
SEP 16 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term [redacted] 1912.

No. [redacted] 478

TOBIAS MILLER,
Plaintiff-in-Error,

vs.

SECONDO GUASTI and JUAN A. BERNARD,
Defendants-in-Error.

MOTION TO AFFIRM.

ALBERT M. YUZZOLINO,
Counsel for Defendants-in-Error,
New York City, N. Y.

WILLIAM C. ROSENBERG,
Counsel for Plaintiff-in-Error,
New York City, N. Y.

APPEAL PRINTING COMPANY, NEW YORK CITY.

INDEX.

	PAGE
Notice of Motion	1
Motion to Affirm	2
Affidavit of Albert M. Yuzzolino	3

Supreme Court of the United States.

TOBIAS MILLER, Plaintiff-in-Error, *against* SECONDO GUASTI and JUAN A. BERNARD, Defendants-in-Error.	No. 877.	October Term, 1911.

Sir:

Please take notice that on the annexed verified statement of facts herein, and upon all the papers and proceedings in the above entitled cause, I shall submit to the Supreme Court of the United States, at a Stated Term thereof, to be held on Monday, October 14th, 1912, at the Capitol, in the City of Washington, in the District of Columbia, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, the motion, of which the within is a copy; and that I shall also submit with said motion and in support of the same, the arguments annexed to and accompanying the said statement of facts.

Dated, New York City, N. Y., September 10th, 1912.

Yours, &c.,

ALBERT M. YUZZOLINO,
Counsel for Defendants-in-Error,
Office and P. O. Address,
11 Broadway,
Borough of Manhattan,
New York City, N. Y.

To
William C. Rosenberg,
Counsel for Plaintiff-in-Error.

4 SUPREME COURT OF THE UNITED STATES.

TOBIAS MILLER,
Plaintiff-in-Error,

against

SECONDO GUASTI and JUAN A. BERNARD,
Defendants-in-Error.

Now come Secondo Guasti and Juan A. Bernard, the defendants-in-error, by Albert M. Yuzzolino, 5 their counsel, and move this Court to affirm the order of the Court of Appeals of the State of New York, which affirms an order of the Appellate Division of the Supreme Court of the State of New York, affirming an order of the Special Term of the Supreme Court of the State of New York, made on the 20th day of March, 1911, in the above entitled action; upon the ground that it is manifest that the writ of error herein was taken for delay only; and that the questions on which the decision of the cause depends, are so frivolous as not to need further argument; and said defendants-in-error 6 also move this Court to grant such other relief in the premises as may be just and proper.

Dated, New York, September 10th, 1912.

ALBERT M. YUZZOLINO,
Counsel for Defendants-in-Error,
Office and P. O. Address,
11 Broadway,
Borough of Manhattan,
New York City, N. Y.

SUPREME COURT OF THE UNITED STATES. 7

TOBIAS MILLER,
Plaintiff-in-Error,

against

SECONDO GUASTI and JUAN A. BERNARD,
Defendants-in-Error.

United States of America,
Southern District of New York, } ss.:

Albert M. Yuzzolino, being duly sworn, deposes 8
and says:

That he is one of the attorneys and counsel for the defendants-in-error named in the above entitled cause, and that he has full charge of the same.

That the proceedings brought up for review by the writ of error herein, were commenced by a petition made by the plaintiff-in-error to the Supreme Court of the State of New York, in which he prays for an order cancelling a judgment recovered against him by the defendants-in-error, upon the ground that, subsequent to the recovering of said judgment, a decree discharging him from 9
all debts provable in bankruptcy, was entered in the United States District Court for the Southern District of New York (fols. 7-9). The judgment is for $1,085.40, and was recovered and regularly docketed in the office of the Clerk of the County of New York, on the 16th day of April, 1895 (fol. 7). The said motion of the plaintiff-in-error was duly opposed by the defendants-in-error, upon proofs submitted, which showed that the address of defendants-in-error, was given in the bankruptcy schedules as "unknown California" (fols. 22, 40, 52); that defendants-in-error received no notice of

10 any bankruptcy proceedings and knew nothing of them until long after they were terminated (fols. 14, 19, 53); and that plaintiff-in-error had notice of the residence and post office address of defendants-in-error (fol. 53).

The Supreme Court of the State of New York ordered the said motion "in all respects, denied" (fol. 5), upon the following memorandum of opinion:

> "The defendant's (plaintiff-in-error's) affidavits clearly show that plaintiffs' (defendants-in-error's) judgment was not duly scheduled as required by the Bankruptcy
11 Act; therefore, this motion must be denied. (See Columbia Bank *v.* Birkett, 174 N. Y., 112; Graber *v.* Gault, 103 A. D., 511)" (fol. 42).

That the plaintiff-in-error thereupon appealed from the said order, to the Appellate Division of the New York Supreme Court, which ordered, "that the order so appealed from be, and the same is hereby, affirmed with $10 costs and disbursements" (fol. 44).

A further appeal was then taken by the plaintiff-in-error from the said order of the Appellate Division, to the Court of Appeals of the State of
12 New York, which Court unanimously affirmed the order of the Appellate Division and rendered its opinion, in which it held that the facts made to appear by the proofs submitted on behalf of the defendants-in-error were deemed by them "sufficient to sustain the finding of the Special Term that the defendant (plaintiff-in-error) had actual notice of the plaintiffs' (defendants-in-error's) residence and post-office address" (fol. 53).

That in the verified petition of the plaintiff-in-error herein, upon which the writ of error was granted, it is stated that, upon the original applica-

tion to the New York Supreme Court, and upon the various appeals, no contention was made that plaintiff-in-error "had actual knowledge of the address of said Guasti & Bernard," and that the latter's "only contention throughout was that, the address of said Guasti & Bernard could have been obtained by * * * the exercise of reasonable diligence" (fol. 66). The fact is, however, that in the brief submitted on behalf of the defendants-in-error, to the Supreme Court of the State of New York, appears the following contention: 13

> "From all these facts the conclusion is irresistible that the defendant (plaintiff-in-error), in the year 1902, when he filed the schedules in bankruptcy, either knew plaintiffs' (defendants-in-error's) address, or could certainly have ascertained it with the exercise of ordinary diligence." 14

And the same contention was made in almost the identical words, in the briefs submitted on behalf of the defendants-in-error, to the Appellate Division of the Supreme Court, and to the Court of Appeals of the State of New York, copies of which were duly served upon counsel for plaintiff-in-error.

That the writ of error herein was allowed by Hon. Charles E. Hughes, Associate Justice of the Supreme Court of the United States, on the 2nd day of November, nineteen hundred and eleven, and that the said appeal has been docketed and is now pending in this Court as No. 877 on the calendar for the October Term, 1911; and the transcript of record herein has been printed. 15

That deponent verily believes that the writ of

16 error herein has been taken for the purpose of delay only; and it is manifest from the record herein and from this verified statement of facts, that the questions upon which the decision of this cause depends, are so frivolous as not to need further argument.

ALBERT M. YUZZOLINO.

Sworn to before me this 10th day of September, 1912.

Wm. Machol,
Notary Public, #7,
New York County.

17

18

FILED.
SEP 16 1912
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

October Term [illegible], 1912.

No. 478

TOBIAS MILLER,
Plaintiff-in-Error,

vs.

SECONDO GUASTI and JUAN A. BERNARD,
Defendants-in-Error.

Brief of Defendants-in-Error on Motion to Affirm.

ALBERT M. YUZZOLINO,
Counsel for Defendants-in-Error,
New York City, N. Y.

APPEAL PRINTING COMPANY, NEW YORK CITY.

Supreme Court of the United States.

TOBIAS MILLER,
Plaintiff-in-Error,

against

SECONDO GUASTI and JUAN A. BERNARD,
Defendants-in-Error.

BRIEF OF DEFENDANTS-IN-ERROR, ON MOTION TO AFFIRM.

The Motion.

Section 1. Defendants-in-error make this motion to affirm, in the above cause which is pending in this Court, on the ground that it is manifest that the writ was taken for delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument. The transcript of the record herein has been printed, and the cause is No. 877 on the October, 1911, Term Calendar of this Court.

The Writ of Error.

Section 2. This cause comes to this Court upon a writ of error, obtained by the plaintiff-in-error, for the purpose of reviewing the decision of the Court of Appeals of the State of New York, upon which a final order was made, affirming an order

of the Appellate Division of the Supreme Court of that State, which affirmed an order of the Supreme Court, made at Special Term thereof, denying the application of plaintiff-in-error, for an order discharging and cancelling a judgment which had been recovered against him by the defendants-in-error, and duly filed in the office of the Clerk of the County of New York, on the 16th day of April, 1895 (fols 7-9).

Section 3. That application was made upon the ground that, subsequent to the date of said judgment, the plaintiff-in-error obtained his discharge in bankruptcy from the United States District Court for the Southern District of New York (fol. 7); and it was brought to be heard pursuant to Section 1268 of the Code of Civil Procedure of the State of New York, which was then in effect, and which was subsequently superseded by Section 150 of the Debtor and Creditor Law of that State; the section of the Debtor and Creditor Law is identical to the section of the Code, and they provide as follows:

> "At any time after one year has elapsed since a bankrupt was discharged from his debts pursuant to the Acts of Congress relating to bankruptcy, he may apply upon proof of his discharge, to the Court in which a judgment was rendered against him, or, if rendered in a Court not of record, to the Court of which it has become a judgment, by docketing it or filing a transcript thereof, for an order directing the judgment to be cancelled and discharged of record. If it appears upon the hearing, that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made, directing said judgment to be cancelled and discharged of record, &c."

Assignment of Error.

Section 4. The only errors, assigned by the plaintiff-in-error, which he seeks to have reviewed by this Court, are that the Court of Appeals and the Supreme Court of the State of New York erred in refusing to order a cancellation of the judgment against him, and that the Court of Appeals and the Appellate Division erred in affirming the order of the Supreme Court of the State of New York; and it is further set forth in the assignment of errors, that by such determinations, the said Courts erred in failing to give full faith and credit to the decree of the District Court of the United States, discharging the plaintiff in bankruptcy (fols. 73-74).

Determinations of the Courts Below.

Section 5. The Supreme Court of the State of New York, to which the application was originally made by plaintiff-in-error, denied the motion, for the reason that, the affidavits of plaintiff-in-error "clearly show that plaintiffs' (defendants-in-error's) judgment was not duly scheduled as required by the Bankruptcy Act" (fols. 42 and 3-5); and this determination was affirmed by the Appellate Division without an opinion (fol. 44).

The Court of Appeals unanimously affirmed this conclusion, and in its opinion gave the following reasons:

> "In considering the case upon the merits, we find that the schedule states the residence and occupation of the plaintiffs as, 'unknown, California.' * * * The affidavits read upon the motion show that the plaintiffs (defendants-in-error) were wine merchants and producers, doing business at Los Angeles, California, and had been engaged in that business

for upwards of twenty-five years past; and that the claim on which the judgment was entered against the defendant (plaintiff-in-error) was based on the acceptance of a draft drawn on the defendant (plaintiff-in-error) by the plaintiffs (defendants-in-error) containing their post office address as Los Angeles, California, which was accepted by him and was given in payment of a carload of wine purchased by said Miller from the plaintiffs (defendants-in-error) in Los Angeles, California. There were additional facts made to appear by the affidavits, which we do not deem it necessary to here refer to, for we deem them sufficient to sustain the finding of the Special Term, that the defendant had actual notice of the plaintiffs' residence and post office address. It also is made to appear that the plaintiffs knew nothing of the proceedings in bankruptcy, or that the defendant had instituted such proceedings, until August 23rd, 1910, long after the discharge had been granted by the Bankruptcy Court" (fol. 53).

Questions for Review.

Section 6. The validity of the discharge in bankruptcy, is in no way involved; it is not and cannot now, be brought up for consideration. The only question that was reviewed and decided, and the only question which could possibly come up under this writ of error, is whether or not, upon the facts disclosed by the proofs of the respective parties, the claim of the defendants-in-error was duly scheduled in time for proof and allowance, pursuant to the provisions of the Bankruptcy Act; and this decision depended wholly upon questions of fact which must now be considered as having been definitely decided.

Section 7. The plaintiff-in-error contended, and

still contends, that he made a truthful statement in his schedules, to the effect that the address of defendants-in-error was unknown to him, and that the debt was by that fact alone, "duly scheduled," within the meaning of the Bankruptcy Act, so as to be covered by his discharge (fols. 66-67).

Defendants-in-error contended that, inasmuch as they had received no notice whatever, and had no knowledge of any of the bankruptcy proceedings (fol. 53, p. 28), they were entitled to show from the facts and circumstances, that the petitioner (plaintiff-in-error) either knew their address, or could have ascertained it with the exercise of ordinary diligence; and they now contend that inasmuch as the Courts below have already found the fact to be "that the defendant (plaintiff-in-error) had actual notice of plaintiffs' (defendant-in-error's) residence and post office address" (fol. 53), there is no question before this Court which needs any further argument.

Conclusion.

Section 8. Defendants-in-error respectfully submit that it appears from the record that the question of law on which the decision of this cause depends, does not need further argument, and that the writ was taken for delay only. They therefore pray that the order appealed from should be affirmed with costs, and that such further relief should be granted in the premises as may be just.

Respectfully submitted,

ALBERT M. YUZZOLINO
Counsel for Defendants-in-Error,
No. 11 Broadway,
Borough of Manhattan
New York City, N. Y.

32

FILED.
OCT 12 1912
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM 1911,

No. 478.

TOBIAS MILLER,

Plaintiff-in-Error,

vs.

SECONDO GUASTI and JUAN A. BERNARD,

Defendants-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR IN OPPOSITION TO MOTION TO AFFIRM.

ALBERT M. YUZZOLINO,
Counsel for Defendants-in-Error,
New York City, N. Y.

WILLIAM C. ROSENBERG,
Counsel for Plaintiff-in-Error,
New York City, N. Y.

Press of Fremont Payne, 47 Broad St.—'Phones, 1600 & 1636 Broad.

Supreme Court of the United States

TOBIAS MILLER, Plaintiff-in-Error against SECONDO GUASTI and JUAN A. BERNARD, Defendants-in-Error.	No. 877 October Term, 1911.

BRIEF OF PLAINTIFF-IN-ERROR IN OPPOSITION TO MOTION TO AFFIRM.

The motion is made to affirm on the ground that the question of law on which the decision of the cause depends, does not need further argument, but that the writ was taken for delay only and is presumably made under Rule 6, Sub-division 5 of the Rules of this Court, which provides:

> "There may be united with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that although the record may show that this Court has jurisdiction, it is manifest that the writ or appeal was taken for delay only, or that the question on which

the jurisdiction depends is so frivolous as not to need further argument."

We submit that the questions involved in this appeal are of the utmost importance. It brings up for review the question whether or no a discharge in bankruptcy is effective to release a bankrupt from the debt of a creditor whose address is scheduled as "Unknown" if in fact he did not know the address. The Court of Appeals has in effect held that "where a debtor who schedules the claim of a creditor as 'Unknown' either knew the address or could have ascertained it with the exercise of ordinary diligence, that such debt is not discharged."

It is contended by the plaintiff-in-error that if, as a matter of fact, he did not know the address and truthfully scheduled the same as "Unknown," that the discharge is effective to release him from such debt, even though he could have obtained it by a diligent inquiry.

It is the contention of the plaintiff-in-error that there is nothing in the bankruptcy statute which requires a bankrupt, upon filing a petition, to make any inquiry regarding the addresses of his creditors.

The Act provides that a bankrupt shall schedule his debts by setting forth the name of the creditor, together with the address "IF KNOWN; IF UNKNOWN, THAT FACT TO BE STATED."

By the ruling of the Court of Appeals, it is held that if the plaintiff-in-error did not know the address and truthfully stated that fact, but could have ascertained it with the exercise of ordinary diligence, that then the discharge is ineffective to release the same, thus injecting into the statute

words unnecessary to give it effect. This question is brought squarely before this Court for review by the assignment of errors (Record Page 37), and the question involved is of considerable importance in view of the fact that the effect of a judgment or decree of a Federal Court has not been given the full faith and credit to which it is entitled under the provisions of the Constitution.

The contention of the plaintiff-in-error seems to be sustained by a line of authorities in addition to the express wording of the Statute. Section 17 of the Act known as the "Bankruptcy Act" declares the effect of a discharge to be as follows:

> "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (3) shall have not been duly scheduled with the *name* of the creditor, if known to the bankrupt."

It will be seen that the only requisite here required is that the debt shall have been duly scheduled with the name of the creditor. It is true that Section 7 of the same Act which imposes certain duties upon the bankrupt, provides that the bankrupt shall prepare, make oath to and file in Court * * * a schedule of his property showing the amount and kind of property, the location thereof, its money value in detail and a list of creditors showing their residences IF KNOWN: IF UNKNOWN, THAT FACT TO BE STATED.

Now it is contended that if a bankrupt has complied with the provisions of this statute regarding the scheduling of debts, that his subsequent discharge in bankruptcy was effective to release the debt, and that where the address of a creditor is scheduled as "Unknown," only proof of actual

knowledge will prevent such discharge from operating to release the debt.

We understand, however, that it is not the function of this Court upon a motion of this character, to determine the merits of the Writ of error, nor that it is necessary for the plaintiff-in-error to show in his brief that the writ of error will be sustained and the order reversed, but only that the Writ was not taken for the purpose of delay, and that the record herein presents questions which this Court should pass upon and determine, and we beg to submit herewith a printed copy of the brief of the plaintiff-in-error submitted to the New York Court of Appeals, which partly presents the argument we intend to use in this Court.

It is respectfully submitted, therefore, that it is not manifest from the record that the questions upon which the decision of this cause depends are frivolous, but on the contrary are such as require further argument and review by this Court, and that the Writ has not been taken for the purpose of delay.

WILLIAM C. ROSENBERG,
Of Counsel for Plaintiff-in-Error.

33

FILED.
OCT 12 1912
JAMES H. McKENNEY,
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Supreme Court of the United States

OCTOBER TERM 1911,

No. 478.

TOBIAS MILLER,

Plaintiff-in-Error,

vs.

SECONDO GUASTI and JUAN A. BERNARD,

Defendants-in-Error.

AFFIDAVIT IN OPPOSITION TO MOTION TO AFFIRM.

ALBERT M. YUZZOLINO,
Counsel for Defendants-in-Error,
New York City, N. Y.

WILLIAM C. ROSENBERG,
Counsel for Plaintiff-in-Error,
New York City, N. Y.

Press of Fremont Payne, 47 Broad St.—'Phones, 1600 & 1636 Broad.

Supreme Court of the United States

TOBIAS MILLER,
Plaintiff-in-Error

against

SECONDO GUASTI and JUAN A. BERNARD,
Defendants-in-Error.

State of New York,
County of New York, } ss.:

Tobias Miller being duly sworn, says:

That he is the plaintiff-in-error above named. That feeling aggrieved by the order of the Court of Appeals of the State of New York, he sued out a writ of error from this Court and promptly prosecuted the same.

That within the time provided by the rules of this Court, and without asking for any extension thereof, he procured the record to be transmitted from the Supreme Court of the State of New York to this Court, and long before the time required and before any request by the Clerk of this Court.

he caused to be deposited with the Clerk thereof, a sum of money sufficient to provide for the printing of the record, and that such record was thereupon printed and is now on file in this Court and copies thereof are in the hands of the respective counsel.

That upon procuring the Writ of Error, he filed an approved bond of a surety company for the costs in this Court, and since the said Writ of Error has been granted, has delivered to the counsel for the defendants in error an approved bond in an amount sufficient to cover the judgment of the defendants in error, and conditioned for the payment of the amount of said judgment, with interest, should this Writ of Error be dismissed or the order of the Court of Appeals affirmed.

That it is not and never was the intention of deponent to delay the defendants in error, but deponent has in every way secured the defendants in error in the payment of their judgment, should this Court finally hold that the same was not effected by the discharge in bankruptcy.

That the judgment in question was recovered against deponent in April, 1895, over seventeen years ago and three years before the passage of the present bankruptcy law, and deponent did not file his petition in bankruptcy until the year 1902, four years after the passage of the Bankruptcy Act, and that the debt upon which said judgment was obtained accrued in the year 1891, and deponent failed in business in that year, all of which was eight years before the filing of his petition in bankruptcy, and such petition in bankruptcy was filed solely for the purpose of clearing deponent's name of this old debt, among others, and the reason claimed of the defendants in error that deponent's dis-

charge was inefficient to release this debt, came as a distinct surprise to deponent.

That, as above set forth, deponent has prosecuted this Writ with all speed, and there is nothing remaining which deponent could do to hasten the argument thereof, and deponent is very desirous of presenting the questions involved to this Court for its determination.

That the defendants-in-error cannot be prejudiced in any way by awaiting the full submission of the questions involved to this Court, as they are amply secured by a surety company bond, as above set forth.

WHEREFORE deponent prays that the motion to dismiss or affirm may be denied.

TOBIAS MILLER.

Sworn to before me ~~this~~
11 ~~X~~th day of October, 1912.
L. Arnold Lippman
~~Notary Public~~
Commissioner of Deeds, New York City.
(Seal
#95